IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 76-1598

STANDARD FORGE AND AXLE COMPANY, INC.,

Petitioner,

v.

WILLIAM T. COLEMAN, Secretary of the Department of Transportation, the DEPARTMENT OF TRANSPORTATION, JAMES B. GREGORY, Administrator of the National Highway Traffic Safety Administration, the NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION and the UNITED STATES OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner, Standard Forge and Axle Company, Inc. prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the District of Columbia Circuit, dated January 11, 1977, affirming an order dated September 26, 1975 of the United States District Court for the District of Columbia.

OPINIONS BELOW

The District Court issued its unreported order on September 26, 1975, a copy of which is attached, designated Appendix A. The opinion of the Court of Appeals dated January 11, 1977 is not yet reported. A copy of such order is attached, designated Appendix B. An order of the Court of Appeals denying Plaintiff-Appellant's petition for rehearing dated February 14, 1977 also is not reported. A copy of such order is attached, designated Appendix C.

JURISDICTION

The judgment of the Court of Appeals was entered on January 11, 1977 (App. B). A petition for rehearing was filed on January 25, 1977, which was denied on February 14, 1977 (App. C). Jurisdiction of the Supreme Court to review the decision of the Court of Appeals (App. B) is invoked under 28 U.S.C. §1254(1) (1970).

QUESTION PRESENTED

Does the special judicial review provision of the National Traffic and Motor Vehicle Safety Act of 1966, namely Section 105(a)(1), 15 U.S.C. §1394(a)(1) (1970), which confers jurisdiction on the United States Courts of Appeal for judicial review of orders promulgated pursuant to Section 103(a), 15 U.S.C. §1392(a) (1970), of the Act, withdraw the jurisdiction of the United States District Court for the District of Columbia under the Administrative Procedure Act, the Declaratory Judgment Act and the general equity powers of Federal District Courts for judicial review of acts of the National Highway Traffic Safety Administration, deemed in excess of its statutory authority?

U.S. STATUTE INVOLVED

The U.S. statute involved in this petition is the National Traffic and Motor Vehicle Safety Act of 1966, as amended, and, specifically, the judicial review provisions of such Act, Section 105(a) thereof, 15 U.S.C. 1394(a), a copy of which is attached, designated Appendix D.

STATEMENT OF THE CASE

Section 103(a) of the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. §1392(a) (1970), authorized the Secretary of Transportation to establish by order appropriate Federal Motor Vehicle Safety Standards. Section 102(1) of the Act, 15 U.S.C. §1391(1) (1970), defines "Motor Vehicle Safety" as "the performance of motor vehicles or motor vehicle equipment in such a manner that the public is protected against unreasonable risk of accidents occurring as a result of the design, construction or performance of motor vehicles and is also protected against unreasonable risk of death or injury to persons in the event accidents do occur, . . ." Pursuant to the authority conferred by Section 103(a) of the Act, as delegated, the Administrator of the National Highway Traffic Safety Administration promulgated Federal Motor Vehicle Safety Standard No. 121, 49 C.F.R. 571.121 (1974), relating to air brake systems, providing an effective date for some types of vehicles and most truck trailers of January 1, 1975.

Section 105(a)(1) of the National Traffic and Motor Vehicle Safety Act, 15 U.S.C. §1394(a)(1) (1970), provides:

> In a case of actual controversy as to the validity of any order under Section 103, any person who will be adversely affected by such order when it is effective may at any time prior to the sixtieth day

> after such order is issued file a petition with the United States Court of Appeals for the circuit wherein such person resides or has his principal place of business, for judicial review of such order . . .

In addition to this special judicial review provision, Section 105(a)(6) of the Act, 15 U.S.C. §1394(a)(6) (1970), provides:

> The remedies provided for in this subsection shall be in addition to and not in substitution for any other remedies provided by law.

Petitioner Standard Forge, an Alabama corporation having its principal place of business in Montgomery, Alabama, is engaged in the manufacture and sale in interstate commerce of axle assemblies equipped with air brake components for use in the manufacture of truck trailers in the United States and foreign countries. By virtue of the fact that Standard Forge manufactures and sells to truck trailer manufacturers axle assemblies equipped with air brake components which must comply with Federal Standard No. 121, Standard Forge is affected by the implementation and operation of such standard.

On or about June 17, 1975, Petitioner Standard Forge filed an action in the U.S. District Court for the District of Columbia, invoking jurisdiction under the Administrative Procedure Act, 5 U.S.C. §551 et seq., 701 et seq. (1970), the Declaratory Judgment Act, 28 U.S.C. §§2201, 2202 (1970), and the general equity powers of Federal District Courts, seeking a judgment a) declaring that the promulgation of Federal Standard No. 121 was in excess of the statutory authority conferred on the Respondents and that, therefore, such standard was null and void, b) setting aside such standard and c) enjoining the Respondents from enforcing conformance with such

standard. In particular, Petitioner Standard Forge alleged in its complaint that as a prerequisite to the adoption of a motor vehicle safety standard under the provisions of Section 103 of the Act, it is required to be established that the proposed standard is needed both to protect the public against *unreasonable risk* of accidents occurring as a result of the design, construction or performance of motor vehicles, and to protect the public against *unreasonable risk* of death or injury to persons in the event accidents do occur. Petitioner further alleged that neither of the prerequisite findings were made. Petitioner concluded that absent such findings, rule making proceedings in the area of air brake systems are not authorized and, as a consequence, the formulation, adoption and promulgation of any standards in such area also are not authorized.

On or about August 18, 1975, Respondents filed a motion in the U.S. District Court for the District of Columbia pursuant to Rule 12(b)(1), Federal Rules of Civil Procedure, for dismissal of such action on the ground that the District Court lacked jurisdiction over the subject matter of the action. In support of such motion, Respondents argued that Section 105(a)(1) of the Motor Vehicle Safety Act conferred exclusive jurisdiction for judicial review of all orders issued pursuant to the Act on the Courts of Appeals, citing *Nader v. Volpe*, 151 U.S. App. D.C. 90, 466 F.2d 261 (1972). Ruling on the motion, the District Court entered an order granting Respondents' motion to dismiss for lack of subject matter jurisdiction, (App. A), citing *Nader v. Volpe*, without further comment.

In response to the District Court's dismissal of its complaint on the grounds of lack of subject matter jurisdiction, Petitioner Standard Forge filed an appeal to the U.S. Court of Appeals for the District of Columbia

Circuit, arguing that the Court of Appeals decision in *Nader v. Volpe*, was neither controlling nor applicable to the issue of subject matter jurisdiction in these circumstances, and further that the holding of the District Court in dismissing Petitioner's complaint was in conflict with the rationale of the Supreme Court in comparable circumstances in *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967).

In affirming the District Court's order, the Court of Appeals, on January 11, 1977, ruled that Petitioner Standard Forge mistakenly relied on *Abbott Laboratories v. Gardner*, and concluded that the District Court was correct in basing its denial of subject matter jurisdiction on *Nader v. Volpe*. App. B at 5. Judge Wilkey dissented to the opinion of the majority, without comment. On or about January 25, 1977, Petitioner Standard Forge filed a petition for rehearing, which petition was denied by the Court of Appeals in an order dated February 14, 1977 (App. C).

REASON FOR GRANTING THE WRIT

THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH THE RATIONALE OF THE SUPREME COURT'S DECISION IN *ABBOTT LABORATORIES V. GARDNER* IN WHICH COMPARABLE FACTUAL CIRCUMSTANCES WERE INVOLVED AND SUBSTANTIALLY IDENTICAL JUDICIAL REVIEW PROVISIONS WERE CONSTRUED.

The judicial review provisions of the National Traffic and Motor Vehicle Safety Act have not been construed by this Court. However, substantially identical judicial review provisions have been construed by the Court in *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967), a case involving factual circumstances comparable to those of the present case.

In *Abbott Laboratories*, a group of drug manufacturers brought an action in a district court under the Administrative Procedure Act, the Declaratory Judgment Act and presumably in reliance on the general equity powers of the court, seeking to enjoin the enforcement of and to set aside certain regulations promulgated by the Secretary of Health, Education and Welfare under the Federal Food, Drug and Cosmetics Act, on the grounds that the Secretary had exceeded his authority under the Act. Without reaching the merits of the case, the Court of Appeals for the Third Circuit dismissed the action on the grounds that the district court lacked subject matter jurisdiction. Upon review of the dismissal action taken by the Third Circuit, the Supreme Court was called upon to construe the judicial review provisions of the Federal Food, Drug and Cosmetics Act, i.e., Section 701(f), 21 U.S.C. §371(f) (1970), a copy of which is attached, designated Appendix E. Notably, Section 701(f)(1) of the Food, Drug and Cosmetics Act provides:

> In a case of actual controversy as to the validity of any order under subsection (e) of this section, any person who will be adversely affected by such order if placed in effect may at any time prior to the ninetieth day after such order is issued file a petition with the United States Court of Appeals for the circuit wherein such person resides or has his principal place of business, for a judicial review of such order . . .

The Court particularly is invited to take note of the fact that such Section 701(f)(1) of the Food, Drug and Cosmetics Act is identical to Section 105(a)(1) of the Motor Vehicle Safety Act with the insignificant exceptions of the reference to the rule promulgating section of the Act and the time permitted to seek review. The Court further will note that Section 701(f)(6) of the Food, Drug and Cosmetics Act provides:

> The remedies provided for in this subsection shall be in addition to and not in substitution for any other remedies provided by law.

which provision is identical to Section 105(a)(6) of the Motor Vehicle Safety Act.

Addressing itself to the jurisdictional issue raised in *Abbott Laboratories*, this Court commented that judicial review of a final agency action would not be cut off unless there is persuasive reason to believe that such was the purpose of Congress. 387 U.S. at 140. It then referred to the legislative history of the special review provision of the Food, Drug and Cosmetics Act, i.e., Section 701(f)(1), and made several observations. Firstly, it noted, 387 U.S. at 143, that the supporters of the special review provision in the Congress sought to include the provision in the Act primarily to provide a method for reviewing agency factual determinations. Secondly, it noted, 387 U.S. at 143-144, that another reason for enacting the provision was to provide a broader venue to litigants challenging such agency factual determinations. In this latter regard, the Court commented, 387 U.S. at 144, that at that time, a suit against the Secretary was proper only in the District of Columbia, an advantage that the Government sought to preserve.

The Court further noted, 387 U.S. at 144, that the legislative history showed rather conclusively that the special review provision of the Act was designed to give an additional remedy to aggrieved persons and not to cut down more traditional channels of review. By "traditional channels of review," the Court specifically alluded to the Administrative Procedure Act, the Declaratory Judgment Act and the general equity powers of the Federal district courts. In such context, the Court emphasized, 387 U.S. at 141, that the "Administrative

Procedure Act's 'generous review provisions' must be given a 'hospitable' interpretation."

The Court then concluded, 387 U.S. at 144,

> Against this background we think it quite apparent that the special review procedures provided in §701(f), applying to regulations embodying technical factual determinations, were simply intended to assure adequate judicial review of such agency decisions, and that their enactment does not manifest a congressional purpose to eliminate judicial review of other kinds of agency action.
>
> This conclusion is strongly buttressed by the fact that the Act itself, in Section 701(f)(6) states, "The remedies provided for in this subsection shall be in addition to and not in substitution for any other remedies provided by law." This saving clause was passed over by the Court of Appeals without discussion. *In our view, however, it bears heavily on the issue, for if taken at face value it would foreclose the Government's main argument in this case.* (Emphasis added).

The legislative history of the National Traffic and Motor Vehicle Safety Act pertinent to the judicial review provisions thereof is almost completely silent. However, considering the similarities of the review provisions of the Food, Drug and Cosmetics Act and the Motor Vehicle Safety Act, it reasonably can be inferred that the intent of the Congress in enacting the judicial review provisions of the Food, Drug and Cosmetics Act and that of the Motor Vehicle Safety Act was the same, and that the rationale and interpretations of the Supreme Court in construing the review provisions of the Food, Drug and Cosmetics Act would be the same in construing comparable provisions of the Motor Vehicle Safety Act.

The Court of Appeals, in its opinion of January 11, 1977, misconstrued the issue before the Court and

correspondingly misinterpreted the Court's holding. In seeking to state the issue before the Court in *Abbott Laboratories,* the Court of Appeals mistakenly cited the argument made by the Government which was rejected by this Court. To illustrate, the Court of Appeals stated on page 4 of its opinion (App. B):

> As the [Abbott] Court stated, the issue was whether the fact that
>
> > "because the statute includes a specific procedure for . . . review of certain enumerated kinds of regulations, not encompassing those of the kind involved here, other types were necessarily meant to be excluded from any pre-enforcement review."

The complete text of the above quotation, however, is:

> Again in Rusk v. Cort, supra, 369 US at 379-80, 7 L ed 2d at 816, 817, the Court held that only upon a showing of "clear and convincing evidence" of a contrary legislative intent should the Courts restrict access to judicial review. See also Jaffee, Judicial Control of Administrative Action 336-359 (1965).
>
> Given this standard, we are wholly unpersuaded that the statutory scheme in the food and drug area excludes this type of action. The Government relies on no explicit statutory authority for its argument that pre-enforcement review is unavailable, but insists instead that *because the statute includes a specific procedure for such review of certain enumerated kinds of regulations, [footnote omitted] not encompassing those of the kind involved here, other types were necessarily meant to be excluded from any pre-enforcement review.* The issue, however, is not so readily resolved; we must go further and inquire whether in the context of the entire legislative scheme the existence of that

> circumscribed remedy evinces a congressional purpose to bar agency action not within its purview from judicial review. As a leading authority in this field has noted, "The mere fact that some acts are made reviewable should not suffice to support an implication of exclusion as to others. The right to review is too important to be excluded on such slender and indeterminate evidence of legislative intent." Jaffe, supra at 357. 387 U.S. at 141. (Emphasis added).

In stating that "[t]he issue, however, is not so readily resolved," the Supreme Court explicitly rejected the Government's argument. It then proceeded to examine the legislative history of the Act and found no congressional intent to bar the type of action brought by the petitioner. 387 U.S. at 142.

In bringing the present action, Petitioner Standard Forge does not seek to challenge the factual determinations made by the National Highway Traffic Safety Administration in the course of its rule making proceedings, resulting in the adoption and promulgation of Federal Standard No. 121 for air brake systems. Instead, Standard Forge seeks to challenge the Administrator's authority to have undertaken such proceedings in the first instance on the grounds that the statute authorizing the Administrator to undertake such proceedings requires that the design, construction and performance of pre-Federal Standard No. 121 air brake systems presented an *unreasonable* risk of accidents and an *unreasonable* risk of death or injury to persons in the event accidents do occur, and that it has never been established through any evidence compiled prior to undertaking rule making proceedings, leading to the formulation and adoption of an air brake system standard, that any such *unreasonable* risks ever existed.

Simply stated, Petitioner Standard Forge is alleging that the Administrator has exceeded its statutory authority, i.e., acted *ultra vires*, in undertaking rule making proceedings leading to the formulation and adoption of Federal Standard No. 121, and merely is invoking the jurisdiction of the U.S. District Court for the District of Columbia under the Administrative Procedure Act, the Declaratory Judgment Act and the general equity powers of Federal district courts in challenging such agency action. The action taken by Standard Forge in seeking redress is consistent and in harmony not only with the Supreme Court's decision in *Abbott Laboratories* but also with the Court of Appeal's opinion in *Nader v. Volpe*, which explicitly found that §105(a)(6) of the Act, 15 U.S.C. §1394(a)(6), was available for judicial review of *ultra vires* agency actions. 151 U.S. App. D.C. at 100; 466 F.2d at 221.

CONCLUSION

If the decision of the Court of Appeals is allowed to stand, the result will be that no party may challenge the promulgation of any order of the National Highway Traffic Safety Administration, deemed to be *ultra vires*, unless the suit is brought within sixty days of the issuance of the order. The strict time limits of §105(a)(1) would so require. It is inconceivable that any party should have only sixty days to attack such actions. Unless such actions may be attacked at anytime, it is possible that *ultra vires* orders may be legitimatized and thereby acquire the force of law.

The right to attack *ultra vires* agency actions, wherever and whenever found, may not be limited by any statute of limitation. The language of §105(a)(6) mandates that *ultra vires* actions may be challenged in any forum under the Administrative Procedure Act, the Declaratory

Judgment Act, or the traditional equitable powers of the Federal district courts.

It respectfully is submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

PETER N. LALOS
Counsel for Petitioner.

APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 75-975

STANDARD FORGE AND AXLE COMPANY, INC.,
Plaintiff,

v.

WILLIAM T. COLEMAN *et al.*,
Defendants.

ORDER

Upon consideration of defendants' Motion to Dismiss with memorandum of points and authorities in support thereof, plaintiff's memorandum of points and authorities in opposition thereto, and the entire record herein, it is by the Court this 26th day of September, 1975,

ORDERED, that defendants' Motion to Dismiss for lack of subject-matter jurisdiction is granted, *Nader v. Volpe*, 151 U.S. App. D.C. 90; 466 F.2d 261 (1972); and it is

FURTHER ORDERED, that this action is hereby dismissed.

/s/John H. Pratt
John H. Pratt
United States District Judge

[FILED Sep 26, 1975
James F. Davey, Clerk]

APPENDIX B

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S. App. D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-2151

Standard Forge and Axle Company, Inc.,
Appellant

v.

William T. Coleman, Secretary of the Department of Transportation, et al.,
Appellees

Appeal from the United States District Court for the District of Columbia

(D.C. Civil Action No. 75-975)

Argued December 14, 1976

Decided January 11, 1977

Peter N. Lalos, for appellant. *Nathaniel A. Humphries* also entered an appearance for appellant.

Karen I. Ward, Assistant United States Attorney, with whom *Earl J. Silbert*, United States Attorney, *John A. Terry*, *David R. Addis*, Assistant United States Attorneys, and *Roger C. Spaeder*, Assistant United States Attorney at the time the brief was filed, were on the brief for appellee.

Before: Robb and Wilkey, *Circuit Judges* and Gesell,* *United States District Judge* for the United States District Court for the District of Columbia.

Opinion for the Court filed by *District Judge* Gesell.

Circuit Judge Wilkey dissents to the foregoing opinion.

GESELL, *District Judge:* Appellant petitioned the Administrator of the National Highway Traffic Safety Administration for repeal of Federal Motor Vehicle Safety Standard No. 121. 49 C.F.R. 571.121 (1974). When the petition was denied appellant sought review by the United States District Court for the District of Columbia. Judge John H. Pratt dismissed the petition for lack of subject matter jurisdiction, and this appeal ensued. We affirm.

Pursuant to the National Traffic and Motor Vehicle Safety Act of 1966, Federal Motor Vehicle Safety Standards are established by the Administrator under authority delegated by the Secretary of Transportation. 15 U.S.C. §1392. The Administrator promulgated Federal Motor Vehicle Safety Standard No. 121 to establish "performance and equipment requirements for braking systems for vehicles equipped with air brake systems." The Administrator had by rule, 49 C.F.R. 553.31, provided that any interested person could petition to "amend or repeal" such a standard and appellant accordingly petitioned for total repeal, alleging that the standard was unnecessary and in excess of statutory authority. When the petition was denied for reasons stated and published in the *Federal Register*, 40 Fed. Reg. 2351, appellant sought review in the District Court, all administrative procedures having been exhausted.

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*Sitting by designation pursuant to 28 U.S.C. §292(a).

Section 105(a)(1) of the National Traffic and Motor Vehicle Safety Act provides:

> In a case of actual controversy as to the validity of any order under Section 103, any person who will be adversely affected by such order when it is effective may at any time prior to the sixtieth day after such order is issued file a petition with the United States court of appeals for the circuit wherein such person resides or has his principal place of business, for judicial review of such order. . . .
>
> 15 U.S.C. §1394(a)(1)

In addition to this special judicial review provision, section 105(a)(6) of the Act provides:

> The remedies provided for in this subsection shall be in addition to and not in substitution for any other remedies provided by law.
>
> 15 U.S.C. §1394(a)(6)

Appellant contends that this latter section was designed to provide concurrent jurisdiction in the United States District Court and the United States Court of Appeals, and that lacking an exclusive review provision it could choose in its interest how best to seek review. In response the Administrator contends that where Congress has provided a special and adequate procedure for judicial review, as it has done here, that procedure is to be considered exclusive except in special circumstances not present here.

Appellant mistakenly relies on *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967). While the Supreme Court did recognize jurisdiction in a District Court to review an order of the Food and Drug Administration under a comparable special and reserved jurisdiction statute, 21 U.S.C. §371(f)(1) and (6), the facts here are wholly different. In *Abbott Laboratories* the special review

provision was not available, so the District Court was properly called upon to act. As the Court stated, the issue was whether the fact that

> because the statute includes a specific procedure for . . . review of certain enumerated kinds of regulations, not encompassing those of the kind involved here, other types were necessarily meant to be excluded from any pre-enforcement review.
>
> 387 U.S. at 141.

In the present case the special review provision was clearly available. The District Court, accordingly, properly relied on our decision in *Nader v. Volpe*, 151 U.S. App. D.C. 90, 466 F.2d 261 (1972), where we dealt with this very problem under the Motor Vehicle Safety Act itself.

After reviewing the "other remedies" jurisdictional provision we were unwilling to "construe that provision as a license to resort to nonstatutory remedies," and confined that provision "to instances of agency action which is *ultra vires* or damaging beyond the capability of the statutory procedure to repair." 151 U.S. App. D.C. at 100; 466 F.2d at 271.

Appellant made no complaint below that statutory procedures were inadequate, that relief could not be obtained by review here, or that any other extraordinary circumstances pertained. The statutory mode of review would have served adequately. Standard Forge was in the wrong court.

Affirmed.

WILKEY, *Circuit Judge*: I respectfully dissent.

APPENDIX C

[FILED Feb 14, 1977,
George A. Fisher, Clerk]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1976
Civil Action 75-975

No. 75-2151

Standard Forge and Axle Company, Inc.,
Appellant

v.

William T. Coleman as Secretary of the
Department of Transportation, et al.

BEFORE: Robb and Wilkey, Circuit Judges; Gesell*, United States District Judge for the United States District Court for the District of Columbia

ORDER

Upon consideration of appellant's unopposed "Motion Under Rules 2 and 26(b), F.R.A.P., for Suspension in Part of Rule 40 F.R.A.P.", and it appearing that appellant has lodged a petition for rehearing in the Clerk's Office, it is

ORDERED by the Court that appellant's motion is granted and the Clerk is directed to file appellant's petition for rehearing and to enter same on the docket, and it is

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*Sitting by designation pursuant to 28 U.S.C. §292(a).

FURTHER ORDERED by the Court that appellant's petition for rehearing is denied.

Per Curiam

For the Court:

GEORGE A. FISHER
Clerk

APPENDIX D

The National Traffic and Motor Vehicle Safety Act of 1966, Section 105, 15 U.S.C. 1394(a) provides:

Sec. 105. (a)(1) In a case of actual controversy as to the validity of any order under section 103, any person who will be adversely affected by such order when it is effective may at any time prior to the sixtieth day after such order is issued file a petition with the United States court of appeals for the circuit wherein such person resides or has his principal place of business, for a judicial review of such order. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Secretary or other officer designated by him for that purpose. The Secretary thereunder shall file in the court the record of the proceedings on which the Secretary based his order, as provided in section 2112 of title 28 of the United States Code.

(2) If the petitioner applies to the court for leave to adduce additional evidence, and shows to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Secretary, the court may order such additional evidence (and evidence in rebuttal thereof) to be taken before the Secretary, and to be adduced upon the hearing, in such manner and upon such terms and conditions as to the court may seem proper. The Secretary may modify his findings as to the facts, or make new findings, by reason of the additional evidence so taken, and he shall file such modified or new findings, and his recommendation, if any, for the modification or setting aside of his original order, with the return of such additional evidence.

(3) Upon the filing of the petition referred to in paragraph (1) of this subsection, the court shall have

jurisdiction to review the order in accordance with section 10 of the Administrative Procedure Act (5 U.S.C. 1009) and to grant appropriate relief as provided in such section.

(4) The judgment of the court affirming or setting aside, in whole or in part, any such order of the Secretary shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28 of the United States Code.

(5) Any action instituted under this subsection shall survive, notwithstanding any change in the person occupying the office of Secretary or any vacancy in such office.

(6) The remedies provided for in this subsection shall be in addition to and not in substitution for any other remedies provided by law.

APPENDIX E

The Food, Drug and Cosmetics Act, Section 701(f), 21 U.S.C. 371(f) provides:

(f)(1) In a case of actual controversy as to the validity of any order under subsection (e) of this section, any person who will be adversely affected by such order if placed in effect may at any time prior to the ninetieth day after such order is issued file a petition with the United States court of appeals for the circuit wherein such person resides or has his principal place of business, for a judicial review of such order. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Secretary or other officer designated by him for that purpose. The Secretary thereupon shall file in the court the record of the proceedings on which the Secretary based his order, as provided in section 2112 of Title 28.

(2) If the petitioner applies to the court for leave to adduce additional evidence, and shows to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in evidence in the proceeding before the Secretary, the court may order such additional evidence (and evidence in rebuttal thereof) to be taken before the Secretary, and to be adduced upon the hearing, in such manner and upon such terms and conditions as to the court may seem proper. The Secretary may modify his findings as to the facts, or make new findings, by reason of the additional evidence so taken, and he shall file such modified or new findings, and his recommendation, if any, for the modification or setting aside of his original order, with the return of such additional evidence.

(3) Upon the filing of the petition referred to in Paragraph (1) of this subsection, the court shall have

jurisdiction to affirm the order, or to set it aside in whole or in part, temporarily or permanently. If the order of the Secretary refuses to issue, amend, or repeal a regulation and such order is not in accordance with law the court shall by its judgment order the Secretary to take action, with respect to such regulation, in accordance with law. The findings of the Secretary as to the facts, if supported by substantial evidence, shall be conclusive.

(4) The judgment of the court affirming or setting aside, in whole or in part, any such order of the Secretary shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 346 and 347 of Title 28.

(5) Any action instituted under this subsection shall survive notwithstanding any change in the person occupying the office of Secretary or any vacancy in such office.

(6) The remedies provided for in this subsection shall be in addition to and not in substitution for any other remedies provided by law.